81-855

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ALEXANDER L. STEVAS

No. ....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CHARLES ANDERSON, Warden,

Petitioner,

v

CORNELL FULLER,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

Where the evidence presented in support of Respondent's state court felony murder conviction supports the jury's conclusion that [redacted] intentionally aided the commission of an arson murder by acting as a lookout, was sufficient evidence adduced for a rational trier of fact to find proof of guilt beyond a reasonable doubt?

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## OPINIONS BELOW

In 1970 Respondent Fuller was convicted by a jury in the Detroit, Michigan Recorder's Court of felony murder and was sentenced to the mandatory term of life imprisonment. The conviction was affirmed by the Michigan Court of Appeals, *People* v *Fuller*, 44 Mich App 297 (1973) (App. 40a) and by the Michigan Supreme Court, *People* v *Fuller*, 395 Mich 451 (1975) (App. 31a). Respondent sought a writ of habeas corpus in the United States District Court for the Eastern District of Michigan which was granted in a Memorandum Opinion and Order filed December 2, 1980 (App. 20a). The judgment granting the writ was affirmed by the United States Court of Appeals for the Sixth Circuit, *Fuller* v *Anderson*, .... F2d .... (September 18, 1981) (App. 1a). By

order of the District Court (App. 30a), as affirmed by the Court of Appeals (App. 28a). Respondent Fuller has been released on bail pending appeal from the District Court's judgment.

## JURISDICTION

The opinion of the Court of Appeals which the State seeks to have reviewed was entered September 18, 1981. This Court's jurisdiction is invoked under 28 USC § 1254(1).

## STATUTES INVOLVED

MCLA 750.71; MSA 28.266:

> "The term 'burn' as used in this chapter shall mean setting fire to, or doing any act which results in the starting of a fire, or aiding, counseling, inducing, persuading or procuring another to do such act or acts."

MCLA 750.72; MSA 28.267:

> "Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years."

MCLA 750.316; MSA 28.548:

> "All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be

committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life."

MCLA 767.39; MSA 28.979:

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

## STATEMENT OF THE CASE

In this habeas corpus proceeding in which the District Court's jurisdiction in the first instance was based upon 28 USC §§ 2241, 2254, the District Court and the Court of Appeals held that despite Respondent Fuller's jury conviction and subsequent affirmance by state appellate courts, his conviction of arson murder was not supported by sufficient evidence for a rational trier of fact to find proof of guilt beyond a reasonable doubt.

On the morning of May 18, 1970, the home of Safronia Turner was destroyed by a fire which was deliberately set. Although Mrs. Turner and several children were able to escape the blaze, two daughters died in the fire and Fuller was charged with the felony murder of one of them, Ruth Turner. It was the prosecution's theory that the fire was caused by a Molotov cocktail thrown against the house by Zerious Meadows and that the Defendant Cornell Fuller aided and abetted the arson by acting in concert with

Meadows and, more particularly, by acting as a lookout while Meadows threw the Molotov cocktail. The defense did not dispute the facts of the crime, but asserted as an alibi the testimony of Fuller's mother that he was home in bed at the time of the offense.

In his opening statement, the prosecutor informed the jury that he intended to prove that Zerious Meadows threw a Molotov cocktail (a gasoline-filled Coke bottle with a lighted rag in it) against the rear of the Turner household, that Meadows also ignited a rug that was at the rear of the house, and that Respondent Cornell Fuller was standing by a gate at the rear of the house looking back and forth, acting as a lookout for Zerious Meadows. Defense counsel's opening statement emphasized the concept of reasonable doubt, urged the jury to carefully weigh credibility of witnesses, improperly informed the jury that a conviction would mean a mandatory sentence of life imprisonment, and emphasized that the defense did not contest the facts of the crime, but rather asserted alibi, Trial transcript 39, 49-50:

> "Ladies and gentlement of the jury, the prosecutor will show that a fire took place and that two people were killed as a result of that fire. Now, the question before this jury is not whether or not two parties died in that incident; the question is who did it?
>
> "• • •.
>
> "Aiding and abetting—aided and abetted—the legal concept, as the court indicated, that would mean somebody that is a party to an incident—I think you are all familiar with that. *You must be firmly convinced that the defendant was the party who aided and abetted in this incident.* There is no question here as to the fact that the incident occurred and the deaths were a result of this in-

cident and the prosecution will show that the burning, in fact, did take place and the deaths were a result of the burning—the burning emanated from an incendiary device, commonly known as a Molotov cocktail. Testimony will be given with regard to a chemical analysis as to what happened. That is not the issue; the issue is the tragic incident, a very sordid situation where the deaths were pitiful. There is no question about that. *The question is whether or not the defendant, in fact, was the party standing at the scene. That is the only question that you have to find—the fact that you have to determine.*" (Emphasis added)

The pathologist testified that Ruth Turner suffered second, third and fourth degree burns on more than sixty per cent of her body surface and that the cause of death was asphyxia by smoke and flame, carbon monoxide in her blood, and burns. Captain Marshall Robinson of the Detroit Fire Department, the arson investigator, testified that two fires were set at the rear of the home and that the fires were deliberately set. Portions of a Coke bottle were recovered and the smell of gasoline was present at the scene. Robert Kuntz, a chemist, testified that gasoline was present in portions of the house siding which were recovered from the scene.

Helen Brownlee, who lived next door to the Turners, testified that on the morning in question she saw five or six boys together in a huddle in front of the Turner home and that Respondent Cornell Fuller was among them. She had known him before the incident, since he lived in the neighborhood. She testified that Fuller and one or two of the other boys went through the front gate of the Turner yard to the back of the home. At that time, one of the boys remaining in front threw something, and she yelled at them since she thought they might be throwing something at her

house. She went out of her house, and as she went down her porch steps, Mrs. Turner ran out of her house and Mrs. Brownlee saw that the Turner house was on fire.

Jefferey Coleman testified that on the morning in question he was going to the Turner house to see one of the Turner children when he cut through the back yard of a neighbor's house and approached the Turner household from the rear. He saw Zerious Meadows on the Turner's back porch and saw Respondent Cornell Fuller standing inside the back yard by the gate. Meadows had a Coke bottle in his hand with liquid in it and Coleman saw Meadows light a rag and throw the bottle against the house where it broke and a fire blazed up, and he saw Meadows strike a match and light another fire. Coleman further testified as follows, Trial transcript 215-218:

"Q. Now, after he had struck the match and started the second fire what happened then?

"A. Well, he had jumped off the porch and then they ran down the alley towards Kercheval.

"Q. When you say they ran down the alley, who ran down the alley?

"A. Zerious and Cornell.

"Q. Towards Kercheval?

"A. Yes, sir.

"Q. During the time that Zerious Meadows was throwing the bottle against the side of the house or against the side of the porch and lighting the match which set—started the second fire did you see what Cornell Fuller was doing?

"A. He was still standing by the gate, looking around.

"Q. When you say he was looking around what, exactly, was he doing?

"A. I guess he was watching out for Zerious—he had looked to Jefferson and he looked back towards Kercheval.

"Q. He looked towards Jefferson and looked back towards Kercheval?

"A. Yes, sir.

"Q. Did he do that once or more than once?

"A. He did it more than once.

"Q. He did it more than once—how many times—

"THE COURT: Was this the alley gate or the gate toward the front of the house?

"A. It was the alley gate.

"Q. How many times would you say Cornell Fuller looked towards Jefferson and then looked back towards Kercheval?

"A. I wouldn't know.

"Q. But it was more than once; is that correct?

"A. Yes, sir.

"Q. Was it more than twice?

"A. Yes, sir.

"Q. Now, during the time that this was taking place, Jefferey, did you hear any words spoken between Zerious and Cornell?

"A. No.

"Q. Did you say anything to them?

"A. No.

"Q. Now, after—strike that please—after the second fire began, you testified that Zerious and Cornell left the backyard; is that correct?

"A. Yes, sir.

"Q. Did they enter the alley?

"A. Yes, sir.

"Q. Did they enter the alley through the gate that Cornell Fuller was standing by?

"A. Yes, sir.

"Q. And then they started running; is that correct?

"A. Yes sir.

"Q. Were they running together or separately, Jefferey?

"A. Together.

"Q. And they were running towards Kercheval; is that correct?

"A. Yes, sir."

Gary Martin testified that on the morning in question Jefferey Coleman had stopped by his house and that Martin

was looking out the window when he saw Respondent Cornell Fuller, Zerious Meadows and four other boys in the alley going towards the Turner house. Shortly afterward, he saw them again when they came through a yard and were running toward the alley. Respondent Cornell Fuller and Zerious Meadows were still in the group. A few minutes thereafter, Jefferey Coleman returned and said that the Turner house was on fire. After presentation of the prosecution's case, the defense moved for a directed verdict, but the court reserved its ruling because it concluded that there was sufficient evidence to go to the jury. The sole defense witness was Respondent Fuller's mother who testified that at the time in question Respondent Fuller was at home in bed.

The court instructed the jury, *inter alia*, on reasonable doubt and the presumption of innocence. The jury returned a verdict of guilty after deliberating less than two hours. At sentencing Respondent Fuller moved to set aside the verdict on the ground that the evidence was insufficient to uphold the conviction. The court denied the motion after summarizing on the record some of the evidence adduced to support the conviction, Trial transcript 421-423; App. 43a-45a. Defense counsel later filed a supplemental motion for new trial which the court took under advisement for some time pending completion of a murder trial involving Zerious Meadows. Following Meadows' conviction of first degree murder, the trial court denied Respondent Fuller's supplemental motion for new trial, App. 45a-47a.

## REASONS FOR GRANTING THE WRIT

### I.

### THE LOWER COURTS' DECISIONS CONFLICT WITH JACKSON v VIRGINIA, 433 US 307 (1979).

*Jackson* v *Virginia, supra,* 443 US at 319, 326 requires that in habeas corpus review of a state court conviction the federal court must view the evidence in the light most favorable to the prosecution; must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved conflicting inferences in favor of the prosecution and must defer to that resolution; prohibits a federal court from making its own subjective determination of guilt or innocence; and prohibits the federal court from scrutinizing the reasoning process used by the state court factfinder. In the instant case the federal courts violated these precepts and instead of merely determining whether *any* rational trier of fact *could have* found the essential elements of the crime beyond a reasonable doubt, they impermissibly asked themselves whether *they* believed that the evidence at the trial established guilt beyond a reasonable doubt. *Jackson* v *Virginia, supra,* 443 US at 318-319.

Respondent Cornell Fuller was charged with felony murder which, by Michigan statute, is first degree murder, MCLA 750.316; MSA 28.548. Although the Michigan Supreme Court recently changed the felony murder doctrine in Michigan, *People* v *Aaron,* 409 Mich 672 (1980), at the time of Fuller's trial in 1970, the common-law felony murder doctrine applied and proof of a homicide committed during the perpetration or attempted perpetration of the felony of arson was sufficient to support a conviction of first degree felony murder. Under Michigan law, the felony of arson is defined by statute, MCLA 750.71, 750.72; MSA

28.266, 28.267, as a specific intent crime which requires proof that a burning be done wilfully or maliciously. The prosecution's theory was that although Fuller did not throw the Molotov cocktail or light the fire himself, he was an accessory and therefore criminally liable under the arson statutes and under the statute abolishing the distinction between accessories and principals, MCLA 767.39; MSA 28.979. There was no dispute as to the burning of the dwelling house or the resulting death of Ruth Turner, but Respondent Fuller's conviction required proof beyond a reasonable doubt either that he intended wilfully and maliciously to aid in burning the house or that he knew Meadows had such an intent and aided him. Because intent is rarely capable of direct proof, it may, of course, be inferred from all of the surrounding circumstances.

Evidence was adduced at the trial which, if believed by the jury, was clearly sufficient to support the inference that Respondent wilfully aided the perpetration of an arson. Although Fuller's mother gave alibi testimony, three other eye witnesses identified Fuller at the scene of the crime and implicated him in the arson murder. There was no evidence of a gasoline can at the scene, and so the jury could have inferred that the perpetrators prepared the Molotov cocktail in advance and brought it with them intending to use it to burn the house. Fuller was identified as one of the group approaching the Turner house just before the arson, he was identified as being present in front of the house and then accompanying Meadows to the rear and standing as a lookout while the fires were started, and he was identified as fleeing from the scene immediately thereafter. The defense did not challenge the fact of the arson murder, but merely attacked the credibility of the prosecution witnesses and asserted alibi. Thus, intent was never at issue since, as defense counsel stated in argument to the jury, Transcript 50:

> "The question is whether or not the defendant, in fact, was the party standing at the scene. That is the only question that you have to find—the fact that you have to determine."

The state court jury was properly instructed regarding the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt, and the elements of the offense. The conviction was affirmed on appeal and it even appears that the Michigan Supreme Court applied an unduly restrictive standard of review in reaching that result, *People* v *Fuller, supra*, 395 Mich at 453:

> "It is for the trier of fact to determine if the prosecution has 'negate[d] every reasonable theory consistent with the defendant's innocence of the crime charged.' It was so determined in this case."

In *Jackson* v *Virginia, supra*, 443 US at 326, this Court specifically declined to adopt such a stringent standard. Because the state court applied a standard of review even more strict than is required by the Constitution, the state court determination is "entitled to great weight." *Jackson* v *Virginia, supra*, 443 US at 322, fn 15.

It thus appears that Defendant challenged only the identity of the perpetrator of the arson murder. By the jury's verdict, the factual conflict of the perpetrator's identity was conclusively resolved against Respondent Fuller. Under the standard enunciated in *Jackson* v *Virginia, supra*, 443 US 307, the evidence must be viewed in the light most favorable to the prosecution and it must be presumed that the trier of fact resolved conflicting inferences in favor of the prosecution. Under this standard, it is readily apparent that a rational jury could have concluded that Respondent Fuller intentionally aided the commission of an arson when he ap-

proached the Turner household in the company of several other youths, when he entered the yard and went to the rear of the house, when he stood guard and acted as a look-out while another youth actually lit the fires, and when he and the others fled together from the scene while the fire destroyed the house and took the life of Ruth Turner. Although other interpretations of the historical facts might have been possible, they must be disregarded in this habeas corpus proceeding in which the court is required to evaluate the case in the light most favorable to the prosecution. ***Jackson*** v ***Virginia, supra.***

The Court has said that in reviewing the sufficiency of evidence in a habeas corpus proceeding, the court may not ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt, ***Jackson*** v ***Virginia, supra,*** 443 US at 318-319, but that is precisely what the Court of Appeals did in the instant case. The entire thrust of the Court of Appeals' opinion demonstrates that its primary concern was not in construing the facts and conflicting inferences in the light most favorable to the prosecution, but rather was with assailing the credibility of the prosecution witnesses. The Court went to great lengths to attack the credibility of prosecution witness Jefferey Coleman, and even included a purported summary of Coleman's testimony in the separate trial of Zerious Meadows. ***Fuller*** v ***Anderson, supra,*** .... F2d at ...., fn 4 and accompanying text; App. 7a. It must be noted that the information pertaining to the trial of Zerious Meadows is not a part of the record in the instant case, either in the state court trial of Respondent Fuller or in this habeas corpus proceeding. The only reference to that purported testimony is found in the brief filed on behalf of Respondent Fuller by the Michigan State Appellate Defender in support of Fuller's application for leave to appeal to the Michigan Supreme Court. The fact that the Court of Appeals in the

instant case would grasp at such a thin reed indicates the lengths to which it was prepared to go in ordering Fuller's release. The Court also appeared to be concerned that Fuller had already served at least nine years of his sentense, *Fuller* v *Anderson*, *supra*, .... F2d at ....; App. 2a, a fact which bears absolutely no relevance to the question of constitutional sufficiency of the evidence.

The District Court acknowledged that there was sufficient evidence to suggest that Fuller was acting as a lookout for Meadows and even acknowledges the reasonableness of such a view. App. 10a, 26a. Instead of recognizing this as a legitimate inference from which the jury could have concluded that Fuller knowingly participated in the arson, the Court belittled it as mere "speculation" and failed to perform its mandatory duty to presume that the trier of fact resolved the inference in favor of the prosecution, *Jackson* v *Virginia*, *supra*, 443 US at 326:

> "... a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution and must defer to that resolution."

## CONCLUSION

While there is no direct evidence of Respondent Fuller's intent, no such evidence is necessary to sustain the conviction since it is an elementary principle of law that intent may be inferred in appropriate circumstances. In the instant case, there was clearly sufficient evidence from which the jury could have inferred that Fuller intentionally aided the commission of an arson. In this habeas corpus proceeding,

the Court is required to presume that the jury inferred that Respondent Fuller acted wilfully in aiding the arson and is required to defer to that interpretation of the evidence. Once the factual question of Respondent Fuller's wilful participation has thus been resolved in the prosecution's favor, the only function of a federal habeas corpus court is to determine whether such wilful participation constitutes sufficient evidence to support the arson conviction, and it cannot be doubted that one who wilfully acts as a lookout during the perpetration of an arson is himself guilty of arson under Michigan law.

There are really two questions presented by this case: Was there sufficient evidence for the jury to convict Fuller of wilfully aiding the arson and, if so, should the jury have convicted him. Only the former question may be litigated in this habeas corpus proceeding. Petitioner submits that the court below granted habeas corpus relief because it impermissibly answered the second question in the negative based on its own subjective evaluation that Fuller should not have been convicted. Under the guise of a constitutional determination on the sufficiency of evidence, the court has thus invaded the exclusive province of the jury to examine the credibility of witnesses and to resolve conflicting factual inferences. A convicted murderer has thus been freed because a federal habeas corpus court believed that a state court jury wrongly interpreted the evidence adduced at trial. Petitioner submits that when that evidence is properly evaluated under the standard of *Jackson* v *Virginia, supra,* it becomes readily apparent that there is sufficient evidence for a rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt.

## RELIEF SOUGHT

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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No. 80-1808

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | |
|---|---|
| CORNELL FULLER,<br>*Petitioner-Appellee,*<br>v.<br>CHARLES E. ANDERSON,<br>*Respondent-Appellant.* | ON APPEAL from the United States District Court for the Eastern District of Michigan. |

Decided and Filed September 18, 1981.

Before: EDWARDS, Chief Judge, WEICK and KEITH, Circuit Judges.

KEITH, Circuit Judge, delivered the opinion of the Court, in which EDWARDS, Chief Judge, joined. WEICK, Circuit Judge, (pp. 10-16) filed a separate dissenting opinion.

KEITH, Circuit Judge. This is an appeal by the State of Michigan from a judgment of the United States District Court for the Eastern District of Michigan granting a petition for a writ of habeas corpus. The district court granted the writ because it found that the petitioner's jury verdict of felony murder was not supported by sufficient evidence. For the reasons discussed below, we affirm the judgment of Chief Judge John Feikens.

[2] I

Petitioner Cornell Fuller was convicted by a jury of felony murder in the Recorder's Court of Detroit, Michigan.[1] He was sentenced to serve life in prison and has served at least nine years of that sentence.

On the morning of May 18, 1970 a fire destroyed the home of Safronia Turner at 1554 Lemay in Detroit. Mrs. Turner and several children managed to escape the blaze, but two of Mrs. Turner's children—Ruth and Regina—were killed in the fire. A fire department investigation revealed that the fire was apparently caused by a "Molotov cocktail" deliberately thrown into the rear of the Turner residence. Petitioner Fuller was arrested and charged with first degree murder in violation of 2 MCLA 750.316.[2] The State alleged, as the underlying felony, that Fuller aided and abetted Zerious Meadows in deliberately setting[3] the fire at the Turner residence.

---

[1]

This conviction was affirmed by the Michigan Court of Appeals, *People* v. *Fuller*, 44 Mich. App. 297 (1973), and by a divided Michigan Supreme Court, *People* v. *Fuller*, 395 Mich. 451 (1975).

[2]

MCLA 750.316; MSA 28.548 provides:

> First Degree Murder—All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.

[3]

MCLA 750.72 provides that specific intent is required in order to commit arson:

The following evidence was introduced at the Fuller trial. Marshall Robinson, Captain of the Detroit Fire Department, testified that a "Molotov cocktail" appeared to have caused the fire. Robert Kuntz, a chemist with the Detroit Fire Department, testified that gasoline was present on portions of the house siding.

Helen Brownlee, who lived next-door to the Turner residence, testified that on the morning of May 18 she saw five or six boys together in a group in front of the Turner home. She testified that Cornell Fuller was one of the boys. She saw Fuller and one or two other boys go through the front gate of the Turner yard. They went to the rear of the Turner residence. At that time, she saw one of the boys, who was still in front, throw something. She yelled at the boys because she thought they had thrown something at her house. She ran out of her house, onto the front porch, and saw that the Turner house was on fire.

Fourteen-year old Jeffrey Coleman, a friend of one of the Turner children, testified that on the morning of the 18th he left his house at eight o'clock to head for the Turner's residence. When he went through the backyard of a neighbor

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Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years.

MCLA 767.39; MSA 28.769 provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

and approached the Turner's residence from the rear, he saw Zerious Meadows on the Turner's back porch. He saw Cornell Fuller standing inside the backyard by the gate. Coleman testified that he saw Zerious Meadows ignite a rag that was stuffed inside a bottle. Meadows then threw the bottle against the Turner's house, starting a fire. He saw Meadows then strike a match and start another fire. Jefferey Coleman also testified as follows:

> Q. Now, after he had struck the match and started the second fire what happened then?
>
> A. Well, he had jumped off the porch and then they ran down the alley towards Kercheval.
>
> Q. When you say they ran down the alley, who ran down the alley?

[4]

> A. Zerious and Cornell.
>
> Q. Towards Kercheval?
>
> A. Yes, sir.
>
> Q. During the time that Zerious Meadows was throwing the bottle against the side of the house or against the side of the porch and lighting the match which set—started the second fire did you see what Cornell Fuller was doing?
>
> A. He was standing by the gate, looking around.
>
> Q. When you say he was looking around what, exactly, was he doing?
>
> A. I guess he was watching out for Zerious—he had looked to Jefferson and he looked back towards Kercheval.

Q. He looked towards Jefferson and looked back towards Kercheval?

A. Yes, sir.

Q. Did he do that once or more than once?

A. He did it more than once.

Q. He did it more than once—how many times—

THE COURT: Was this the alley gate or the gate toward the front of the house?

A. It was the alley gate.

Q. How many times would you say Cornell Fuller looked towards Jefferson and then looked back towards Kercheval?

A. I wouldn't know.

Q. But it was more than once; is that correct?

A. Yes, sir.

Q. Was it more than twice?

[5]

A. Yes, sir.

Q. Now, during the time this was taking place, Jefferey, did you hear any words spoken between Zerious and Cornell?

A. No.

Q. Did you say anything to them?

A. No.

Q. Now, after—strike that, please—after the second fire began, you testified that Zerious and Cornell left the backyard; is that correct?

A. Yes, sir.

Q. Did they enter the alley?

A. Yes, sir.

Q. Did they enter the alley through the gate that Cornell Fuller was standing by?

A. Yes, sir.

Q. And then they started running; is that correct?

A. Yes, sir.

Q. Were they running together or separately, Jefferey?

A. Together.

Q. And they were running towards Kercheval; is that correct?

A. Yes, sir.

App. 83-86.

On cross-examination, young Coleman testified that he attended "special school", having attended regular public schools only until the third grade. At the time of trial, young Coleman resided in a youth home because, as he stated, he had run away from home. Although Coleman testified that he approached the Turner residence from the rear and then saw

[6]

the events as related in his testimony quoted above, he may have been one of the boys who were huddled in front of the Turner house shortly before the fire. Prosecution witness Helen Brownlee testified that she thought a "Jefferey" was with the group of boys. (transcript at 151, 164, 168). In addition, it is undisputed that Coleman failed to warn the Turner's that their house was on fire even through he was at the scene at the time the fire began. Further, Coleman had a fight with one of the Turner children about a month before the fire (transcript at 195-6 and 235), and investigators at least initially were of the view that Coleman was one of the perpetrators of the arson.[4]

Gary Martin testified that on the morning of the fire Jefferey Coleman stopped by his house. Martin looked out his window, after Coleman left, and saw Cornell Fuller, Zerious Meadows and four other boys in the alley near the Turner house. A few minutes later, he saw the boys again when they came through a yard running toward the alley. Fuller and Meadows were still in the group. Finally, Jefferey Coleman returned to Martin's residence and said that the Turner house was on fire.

Detective Sergeant John Roffey testified that he interviewed Mrs. Brownlee the day after the fire. She did not identify

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[4]

At the trial of Zerious Meadows, Jeffrey Coleman testified that after the fire he was arrested, taken to a local police precinct, questioned about his involvement and taken to the juvenile home. *See People* v. *Meadows*, Recorder's Court No. 71-01558, trial transcript pp. 257-58.

In the instant habeas petition, Fuller alleged that the failure of the prosecutor to disclose the above facts during Fuller's trial, and the failure of the prosecutor to disclose Coleman's juvenile record, deprived Fuller of due process of law. Judge Feikens in granting the petition found it unnecessary to reach this issue.

anyone at that time as being involved in the fire, and Detective Roffey testified that her in-court testimony, implicating Fuller, was a surprise to him.

The lone witness for the defense was Hattie Fuller, the mother of the petitioner. She testified that on the morning of the fire her son was at home asleep until about 9:00 a.m.

II [7]

The issue on appeal is whether the foregoing facts are sufficient to sustain the murder conviction of Cornell Fuller. In *In re Winship*, 397 U.S. 358, 364 (1970), the Supreme Court held that the due process clause requires that all criminal convictions must be based upon proof beyond a reasonable doubt. In *Jackson* v. *Virginia*, 443, U.S. 307 (1979), the Supreme Court held that this standard has application in the law of habeas corpus:

> [I]n a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Id.* at 324.

In applying this standard in habeas corpus cases, the federal courts must review the evidence in the light most favorable to the prosecution. The petition must be denied if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 39. *See also Moore* v. *Duckworth*, .... U.S. .... 99 S.Ct. 3088 (1979); *Brewer* v. *Overberg*, 624 F.2d 51 (6th Cir. 1980), *cert. denied*, .... U.S. ...., 101 S.Ct. 873 (1981); *Davis* v. *Campbell*, 608 F.2d 317 (8th Cir. 1979). The district

court recognized that conflicts in the evidence must be resolved in favor of the State, but nevertheless found that the evidence introduced at trial was too meager to support the petitioner's conviction. We agree with the district court's conclusion.

Under *Jackson* v. *Virginia*, we must examine the sufficiency of the evidence here in support of each element of the petitioner's offense. Fuller was convicted of felony murder in Michigan. A felony murder conviction under MCLA 750.316; MSA 28.548 requires proof of each element of the underly-

[8]

ing felony. *People* v. *Allen*, 39 Mich. App. 483, 494 (1972) (Levin, J., dissenting), *adopted*, 390 Mich. 383 (1973). Thus, Fuller could only be convicted under this statute if the jury could rationally have found him guilty of attempted arson beyond a reasonable doubt.[5]

In Michigan, in order to establish arson, the prosecution must show that a person willfully and maliciously burned a dwelling house. *See* note 3 *supra*. In order to prove attempted arson the prosecution must show that the aider and abettor, "if not himself possessed of the requisite specific intent, . . . [at least] rendered his aid and assistance to the principal actor with the knowledge that the principal himself possessed the intent necessary to be guilty of the crime." *People* v. *Rigsby*,

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[5]

*People* v. *Aaron*, 409 Mich. 672, 733 (1980), abolished the felony-murder rule in Michigan. After this ruling the category of malice arising from the intent to commit a felony was struck down. The Michigan Supreme Court held that malice would have to be independently proven for each element of an alleged offense. However, this decision has prospective effect only, *id.* at 734, and has no effect on petitioner's case.

92 Mich. App. 95, 97 (1979). *See also People* v. *Gordon*, 60 Mich. App. 95, 97 (1979). *See also People* v. *Gordon*, 60 Mich. App. 412 (1975); *People* v. *Poplar*, 20 Mich. App. 132 (1969). The Michigan Supreme Court has held:

> Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abetter or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiesence or consent.

*People* v. *Burrel*, 253 Mich. 321, 323 (1931) (quoting 1 Cyc. Crim. Law [Brill] § 233); *People* v. *Casper*, 25 Mich. App. 1, 5 (1970). In other words, the accused must take some conscious action designed to make the criminal venture succeed in order to be guilty of aiding and abetting. *People* v. *Cooper*, 326 Mich. 514 (1950); *People* v. *Gordon*, 60 Mich. App. 412, 418 (1975).

[9]

The district court correctly concluded that the evidence introduced at petitioner's trial only showed that on the morning of May 18 Fuller was present at the Turner residence along with Zerious Meadows and the other boys. The evidence showed that Fuller looked around while Meadows started the fires. But as Judge Feikens pointed out:

> This *suggests*, as Jefferey Coleman surmised, that the petitioner *may have been* acting as a lookout for Meadows. It is reasonable speculation. But could a rational jury find it to be proof beyond a reasonable doubt? No evidence was presented that the petitioner intended to burn the Turner home. The evidence that he knew that Zerious Meadows planned to do is simply too meager to support conviction. (emphasis in original)

We note that there was no evidence at trial that the "Molotov cocktail" which started the fire was prepared in advance, or, if it was, whether any of the boys other than Zerious Meadows knew that the "Molotov cocktail" existed. There was of course no evidence that any of the boys, except Fuller, participated in the manufacture of the "Molotov cocktail".

Moreover, there was no direct evidence that the youths approached the Turner house with intent to set the house on fire. Assuming Zerious Meadows had this intent, however, there was no evidence that it was shared by petitioner or the other boys.

The only direct evidence supporting the State's contention that Fuller "stood guard and acted as a lookout" for Zerious Meadows was Jefferey Coleman's testimony that over a period of several minutes Fuller turned his head from side to side "more than twice". We agree with the district court that this is insufficient to establish beyond a reasonable doubt that Fuller took conscious action to aid Meadows' commission of arson.

Accordingly, the judgment of the district court granting the petition for habeas corpus is affirmed.

[10]

WEICK, Circuit Judge, dissenting: I respectfully dissent. Petitioner Fuller was convicted by a jury in the Recorder's Court of Detroit, Michigan, as an aider and abettor of the arson murder of one of two young girls who died in the fire. His defense was an alibi and in his motion for judgment of acquittal filed after the verdict, he challenged the sufficiency of the evidence. The presiding judge of the Recorder's Court denied his motion. In his opinion and order

denying Fuller's motion for a new trial, the Judge of the Recorder's Court stated, *inter alia;*

> It was not contended that the defendant was the one who threw the fire bomb which burned the house, but the evidence established that he was the look-out while Zerious Meadows (subsequently tried in a separate case on this same charge) threw the fire bomb and set a fire by pouring gasoline on the dwelling in question.
>
> Defense counsel in his Motion for a New Trial makes much of the fact that Cornell Fuller was only seen to run to the alley of the premises here involved and look up and down the alley, but the evidence also indicated that he was the look-out and, therefore, an accessory to the crime, equally chargeable as a principal under Section 767.26, Compiled Laws, 1948.

Upon appeal to the Michigan Court of Appeals, the court held, in a unanimous opinion in *People* v. *Fuller*, 44 Mich. App. 297 (1973):

> 1. Homicide—Murder—Evidence—Inferences.
>
> A jury could reasonably infer that the defendant was a party to the offense of aiding and abetting in the commission of murder where he was shown to have come to the scene in the company of the principal, stood at a gate near the alley behind the house while the principal lit and threw a Molotov cocktail, looked up and down the alley more than once, and ran from the scene with the principal.
>
> [11]

Presiding Judge Quinn, who wrote the opinion for the court stated:

> The first issue is a weight of the evidence question. Our inquiry is, was evidence produced which, if believed, could certainly lead to a reasonable inference that defendant was a party to the offense? *People* v. *Ford*, 19 Mich. App. 519 (1969). There was evidence that defendant came to the scene with Meadows and others; that defendant stood at a gate near the alley behind the house while Meadows lit and threw the Molotov cocktail; that during this time, defendant looked up and down the alley more than once; and that defendant ran from the scene with Meadows. From these facts a jury could reasonably infer that defendant was a party to the offense.

The Supreme Court of Michigan in *People* v. *Fuller*, 393 Michigan 451 (1975), affirmed the conviction in a split decision holding:

> Cornell Fuller was convicted by a jury in Recorder's Court of Detroit, Thomas L. Poindexter, J., of first-degree murder. The prosecution contended that he aided and abetted, by acting as a lookout, in an arson which resulted in the death of two girls. The Court of Appeals, Quinn, P. J., and V. J. Brennan and O'Hara, JJ., affirmed (Docket No. 11308). Defendant appeals. *Held*:
>
> 1. A jury may believe or disbelieve, in whole or in part, any of the evidence presented.
>
> 2. Evidence was presented which, if believed by the jury, showed that the defendant acted as a lookout for the arsonist.

3. The jury determined that the prosecution had negated every reasonable theory consistent with the defendant's innocence of the crime chraged.

Conviction affirmed.

[12]

It is noteworthy that in affirming the conviction, the Supreme Court of Michigan held that the jury determined that the prosecution had negated every reasonable theory consistent with the defendant's innocence of the crime charged. The Supreme Court of the United States held that this was more than the constitutional requirement in *Jackson* v. *Virginia,* 443 U.S. 307, 326 (1979), *citing Holland* v. *United States,* 348 U.S. 121, 140 (1954). In other words, the Michigan Supreme Court in affirming the conviction applied a standard of review more strict than the constitution requires and petitioner received the benefit of this erroneous standard. The decision of the Michigan Supreme Court is entitled to great weight since it applied a standard of review more strict than required by the constitution, *Jackson* v. *Virginia, supra,* p. 326.

At his trial, petitioner's counsel did not object to any of the instructions of the trial court to the jury. His sole defense was alibi. In his opening statement to the jury, counsel for Fuller stated:

> As indicated by the Court, he (Fuller) is not named as the party who threw the incendiary device against this building; he was merely named as a party who was standing by, but you must be convinced as to his identity; that he was, in fact, the party that was an accessory to this crime and standing by.

Now, on behalf of the defendant, we will produce witnesses that will establish his whereabouts at the time of this incident. They will testify that he was at a place other than the home of the Taylor's on May 18, 1970—

THE COURT: I think it is the Turner home, Mr. Reilly.

MR. REILLY: Sorry, your Honor, the home of the Turner's—this incident occurred early in the morning. The witnesses will testify that the defendant was in bed —home in bed asleep.

[13]

Now, the Prosecutor has a different approach to this; it is a question of who you believe—who is telling the truth which is very often a different task to decide but I think the defense will clearly indicate that the defendant was, in fact, in bed the Morning that this incident occurred.

Aiding and abetting—aided and abetted—the legal concept, as the Court indicated, that would mean somebody that is a party to an incident—I think you are all familiar with that. You must be firmly convinced that the defendant was the party who aided and abetted in this incident. There is no question here as to the fact that the incident occurred and the deaths were a result of this incident and the Prosecution will show that the burning, in fact, did take place and the deaths were a result of the burning—the burning emanated from an incendiary device, commonly known as a Molotov cocktail. Testimony will be given with regard to a chemical analysis as to what happened. That is not the issue; the issue is the tragic incident, a very sordid situation where the

> deaths were pitiful. There is no question about that. The question is whether or not the defendant, in fact, was the party standing at the scene. That is the only question that you have to find—the fact you have to determine.
>
> It is indeed conceivable that the witnesses that will testify that they saw the defendant at the scene could have been mistaken. I want you to consider that also.

Fuller's only witness as to the alibi was his mother who testified that petitioner was home sleeping on his bed at the time the arson was committed. The only trouble with the mother's testimony was that it conflicted with the testimony of three other witnesses. Fuller did not testify although he was present in court at the trial. It was solely for the jury to decide who was telling the truth.

[14]

The decision of the Supreme Court of Michigan is final that Fuller's conviction was in conformity with the law of the State of Michigan and it is binding on federal courts with respect not only to the factual findings but also as to the law of the State. 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 101 S.Ct. 764 (1981).

There was abundant proof offered by the state to support the finding of the jury that Fuller not only accompanied the arsonist to the dwelling set on fire, but also acted as a lookout. After the dwelling had been set on fire, the arsonist and Fuller ran away together. If Fuller was innocent of any wrongdoing, why did he run away?

Every element of the crime of aiding and abetting the arsonist was proven beyond a reasonable doubt as was held

by the Supreme Court of Michigan and is in conformity with the decision of the Supreme Court of the United States in *In re Winship*, 397 U.S. 358 (1970). In a habeas corpus proceeding, the federal courts do not have jurisdiction for direct appellate review. In almost every criminal trial in the state, as well as federal courts, the evidence is conflicting and must be resolved. In a collateral proceeding as was held by the Supreme Court in *Jackson* v. *Virginia, supra*, the evidence must be viewed in the light most favorable to the prosecution and the habeas petition denied if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. This standard applies retroactively. *Pilon* v. *Bordenkircher*, 444 U.S. 1 (1979). The standard was incorrectly applied by the district court when it granted the writ.

With the abundance of evidence in the present case, together with the inferences properly deducible therefrom, I submit that the jury did not act irrationally in finding the defendant Fuller guilty as an aider and abettor, nor did the trial judge in denying the motion for judgment of acquittal and in sentencing the defendant, nor did the three judges

[15]

of the Michigan Court of Appeals in affirming the judgment of conviction. Nor did the majority of the judges of the Supreme Court of Michigan in affirming the judgment of the Michigan Court of Appeals.

I submit again that the federal courts in habeas proceedings are bound by the factual findings of the state courts. We are deluged with habeas corpus proceedings, most of which involve the issue as to the sufficiency of the evidence. The rule formerly was the no evidence standard which authorized collateral intervention only where there was no evi-

dence at all to support an important element of the crime. The no evidence standard was modified to the "rational trier of fact" standard, *Jackson* v. *Virginia, supra,* but this new standard has not stemmed the tide which appears to be increasing and has added to the confusion.[1]

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[1]

Footnote 7 in *Jackson* v. *Virginia* states:

> And the Court of Appeals for the Sixth Circuit recently recognized the possible impact of *Winship* on federal habeas corpus in a case in which it held that "a rational trier of fact could have found the defendant . . . guilty beyond a reasonable doubt." *Spruytte* v. *Koehler,* affirmance order, 590 F. 2d 335. An even more recent case in that court provoked a lively debate among three of its members regarding the effect of *Winship* upon federal habeas corpus. The writ was granted in that case, even though the trial record concededly contained "some evidence" of the applicant's guilt. See *Speigner* v. *Jago,* 603 F. 2d 1208 (CA6).

In *Speigner,* the victim was kidnapped, robbed and brutally beaten and shot with a pistol and shotgun by the two criminals, Roger Scott and Henry Speigner, alias Frank Mathews. He was shot in the chest with a pistol and in the back of the head and neck with a shotgun. The two criminals then stole the victim's automobile and dumped his body in a street in Cleveland and then proceeded directly to Youngstown, Ohio, where they were arrested later in the same day by state police. Scott told the police that he rented the automobile from the victim for $15.00. The back seat of the automobile was covered with the victim's type blood and the automobile was damaged. Speigner when arrested was seated in the passenger's seat. The shotgun was under his seat. Speigner was convicted of murder by a jury in the state court, which was affirmed by the state appellate court and leave to appeal was denied by the Supreme Court of Ohio on the ground that there was no debatable constitutional question. The district court granted a writ of habeas corpus which the court affirmed with a dissent, as above indicated, and Speigner was set free.

Speigner's cohort Scott was likewise convicted in the state court which conviction was affirmed by the state appellate court and appeal denied by the Supreme Court of Ohio. The district court granted Scott's application for a writ of habeas corpus and upon appeal to this court the judgment of the district court granting the writ of habeas corpus was

[16]

I would reverse the district court's grant of the writ of habeas corpus and remand for dismissal of the petition.

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reversed, the cause remanded for further proceedings consistent with the opinion, this court distinguishing *Speigner* on the basis of additional evidence linking Scott with the crime not shown in *Speigner*. *Perini* v. *Scott*, ..... F.2d ..... (6th Cir. 1981, No. 80-3219). Thus one murderer was set free by decision of this court while his confederate was not granted relief.

Another case involving a criminal who was set free by habeas relief in a split decision of this court. He had stabbed his former girlfriend some 45 times with a pen knife permanently maiming her and had been convicted in the state court of attempted murder. His conviction had been affirmed by the Michigan Court of Appeals and leave to appeal denied by the Michigan Supreme Court. The district court denied habeas relief and we reversed for an alleged trivial error in an unobjected to charge of the court to the jury. *Burton* v. *Bergman*, No. 80-1497 (6th Cir.). Burton did not even testify and the victim's testimony was unrefuted. The case should also have been affirmed on the ground that the alleged error in the court's instruction, if any, was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

| | |
|---|---|
| CORNELL FULLER,<br>Petitioner<br>vs.<br>CHARLES E. ANDERSON,<br>Respondent | Civil Action<br>No. 79-73171 |

## MEMORANDUM OPINION

Petitioner, Cornell Fuller, a prisoner at the State Prison of Southern Michigan at Jackson, brings this application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. In 1970, he was convicted of felony murder by a jury in the Recorder's Court of the City of Detroit, M.C.L.A. § 750.316. His conviction was affirmed by the Michigan Court of Appeals and by a divided Michigan Supreme Court. *People v. Fuller*, 44 Mich. App. 297 (1973), *aff'd*, 395 Mich. 451 (1975). Supreme Court Justices Kavanagh and Levin dissented, recommending reversal of the conviction for insufficient evidence. Petitioner now urges that the Constitution requires me to adopt the views of that dissent.

This issue is governed by *Jackson v. Virginia*, 443 U.S. 307 (1979), and *In re Winship*, 397 U.S. 358 (1970). In *Winship* the Supreme Court held that due process requires a criminal conviction must be based upon proof of guilt beyond a reasonable doubt. In *Jackson v. Virginia*, the Court adapted this standard to the context of habeas corpus:

> [I]n a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 . . . the applicant is entitled to habeas corpus relief if it is found that upon the record

> evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

443 U.S. at 324. The evidence must be reviewed in the light most favorable to the prosecution, and the petition denied if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319. This standard applies retroactively to cases decided before it was announced. E.g., *Pilon v. Bordenkircher*, 444 U.S. 1 (1979); *Llewellyn v. Stynchcombe*, 609 F.2d 194 (5th Cir. 1980); *Brinlee v. Crisp*, 608 F.2d 839 (10th Cir. 1979), *cert. denied*, 444 U.S. 1047 (1980); *Davis v. Campbell*, 608 F.2d 317 (8th Cir. 1979); *Pate v. Wainwright*, 607 F.2d 669 (5th Cir. 1979); *Sims v. Hopper*, 603 F.2d 581 (5th Cir. 1979).

Petitioner's conviction arose out of the deaths of two young girls in a fire deliberately set in back of their home.[1] A next-door neighbor saw the petitioner near the house with several other teenage boys. (Tr. 131-133). No testimony even suggested that the petitioner may have set the fire. All evidence demonstrated that Zerious Meadows, 16, lit a white cloth in a coke bottle, and threw it toward the house. (Tr. 210-215). According to 14-year old Jeffrey Coleman, the petitioner was standing by the back gate of the house when this occurred. Coleman testified as follows:

> Q: Now after he [Meadows] had struck the match and started the second fire, what happened then?
>
> A: Well, he had jumped off the porch and then they ran down the alley towards Kercheval.
>
> Q: When you say then ran down the alley, who ran down the alley?
>
> A: Zerious and Cornell.

---

[1] Petitioner was charged with the murder of only one of the girls.

Q: Towards Kercheval.

A: Yes, sir.

Q: During the time that Zerious Meadows was throwing the bottle against—the side of the house or against the side of the porch and lighting the match which set—started the second fire did you see what Cornell Fuller was doing?

A: He was still standing by the gate, looking around.

Q: When you say he was looking around what, exactly was he doing?

A: I guess he was watching out for Zerious—he had looked to Jefferson and he looked back towards Kercheval.

Q: He looked towards Jefferson and looked back towards Kercheval?

A: Yes, sir.

Q: Did he do that once or more than once?

A: He did it more than once.

Q: He did it more than once—how many times—

THE COURT: Was this the alley gate or the gate toward the front of the house?

A: It was the alley gate.

Q: How many times would you say Cornell Fuller looked towards Jefferson and then looked back towards Kercheval?

A: I wouldn't know.

Q: But it was more than once; is that correct?

A: Yes, sir.

Q: Was it more than twice?

A: Yes, sir.

Q: Now, during the time that this was taking place, Jeffrey, did you hear any words spoken between Zerious and Cornell?

A: No.

Q: Did you say anything to them?

A: No.

Q: Now, after—strike that, please—after the second fire began, you testified that Zerious and Cornell left the backyard; is that correct?

A: Yes, sir.

Q: Did they enter the alley?

A: Yes, sir.

Q: Did they enter the alley through the gate that Cornell Fuller was standing by?

A: Yes, sir.

Q: And then they started running; is that correct?

A: Yes, sir.

Q: Were they running together or separately, Jeffrey?

A: Together.

Q: And they were running towards Kercheval; is that correct?

A: Yes, sir.

(Tr. 215-218). Another witness testified that he saw the petitioner, Meadows, and four other teenagers walking together in an alley, and later saw the petitioner and Meadows run through a yard and down an alley. (Tr. 287-89; 292-96). This testimony was all that linked the petitioner with the arson and resulting deaths.

The prosecutor's theory was that the petitioner had acted as a lookout, and had, therefore, aided and abetted the commission of the felony. At the close of the State's evidence, Fuller moved for a directed verdict of acquittal. The judge denied the motion, stating:

> The question in this case is a close one. As I regard the testimony the defendant's complicity in the case depends almost completely on the fact that he was present at the scene of the crime and that he was seen going to it and seen running afterwards. There was very meagre evidence to call him a look-out in this particular case; however, the Court is of the impression that we do have a borderline prima facie case in this instance—a border line prima facie case—and, accordingly, the court will reserve its ruling on the motion for a directed verdict. It seems to me that the testimony is the kind that would be—that there would be a high probability that the jury would return a verdict of not guilty in this case, but where there is a prima facie case the Court cannot speculate on it—on the jury's decision in the case and the Court will, however, reserve a ruling on the motion.

(Tr. 324-325). The jury returned a verdict of guilty, and the court thereupon denied a motion to overturn the verdict. Petitioner received the mandatory life sentence for the crime.

Both the Michigan Court of Appeals and the Michigan Supreme Court considered the issue of the sufficiency of the evidence. The Supreme Court, in a 3-2 decision, held that the evidence was sufficient to convict. The dissent argued strongly that "there was simply too many inferences that would have to be drawn, one piled upon another, to justify conviction of this defendant." *People v. Fuller, supra,* at 459.

To rule upon the petition, I must examine the sufficiency of the evidence in support of each element of the offense. In Michigan, conviction of felony murder requires proof of each element of the felony. *People v. Olsson,* 56 Mich. App. 500, 504 (1974). Thus, petitioner could only be convicted under M.C.L.A. § 750.316 if the jury could find him guilty of arson beyond a reasonable doubt.

An arson conviction, under M.C.L.A. § 750.72, requires that a person "wilfully or maliciously burn" a dwelling house. Section 750.71 includes aidors and abettors within the scope of this offense. In *People v. Rigsby,* 92 Mich. App. 95, 97 (1979), the Michigan Court of Appeals described the mental state necessary to sustain the conviction of an aidor or abettor as a principal. "The aidor and abettor of a specific intent crime, if not possessed of the requisite specific intent, must be shown to have rendered his aid and assistance to the principal actor with the knowledge that the principal himself possessed the intent necessary to be guilty of the crime." *Accord, People v. Gordon,* 60 Mich. App. 412 (1975); *People v. Poplar,* 20 Mich. App. 132 (1969). I must grant the petition unless the jury could rationally find, beyond a reasonable doubt, that the petitioner either (1) intended wilfully or maliciously to burn the Turner residence; or (2) knew that

Zerious Meadows intended wilfully or maliciously to burn the home.

The evidence outlined above cannot constitutionally sustain a finding that the petitioner had either of the elements of intent required by Michigan law. The evidence establishes only that the petitioner was with Zerious Meadows and other boys before and after the fires were started, and that the petitioner was looking around while Meadows started them. This *suggests*, as Jeffrey Coleman surmised, that the petitioner *may have been* acting as a lookout for Meadows. It is reasonable speculation. But could a rational jury find it to be proof beyond a reasonable doubt? No evidence was presented that the petitioner intended to burn the Turner home. The evidence that he knew what Zerious Meadows planned to do is simply too meager to support conviction. The state has failed to meet the constitutional burden imposed by *In re Winship*, and no rational jury could conclude that it succeeded.

The petitioner has raised three other issues, which I do not need to decide.

For this reason, the petition for a writ of habeas corpus is GRANTED.

John Feikens /s/
JOHN FEIKENS
CHIEF UNITED STATES
DISTRICT JUDGE

Dated: November 20, 1980
Detroit, Michigan

A TRUE COPY

CLERK U. S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Bonnie Humm /s/
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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|---|---|
| CORNELL FULLER,<br>Petitioner<br>vs.<br>CHARLES E. ANDERSON,<br>Respondent | Civil Action<br>No. 79-73171 |

**ORDER GRANTING PETITION FOR A WRIT OF HABEAS CORPUS**

At a session of said Court held in the Federal Building at Detroit on the 20th day of November, 1980

PRESENT: THE HONORABLE JOHN FEIKENS, CHIEF UNITED STATES DISTRICT JUDGE

The matter having come before this Court on Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and the Court being fully advised in the premises, and for the reasons set forth in the attached Memorandum Opinion.

IT IS ORDERED that the petition for a writ of habeas corpus be, and the same hereby is, GRANTED.

JOHN FEIKENS /s/

CHIEF UNITED STATES
DISTRICT JUDGE

A TRUE COPY

CLERK U. S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

By Bonnie Humm /s/

DEPUTY CLERK

NO. 80-1808
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED—JAN 23 1981

JOHN P. HEHMAN, Clerk

| | |
|---|---|
| CORNELL FULLER,<br>Petitioner-Appellee,<br>v.<br>CHARLES ANDERSON,<br>Respondent-Appellant. | **ORDER** |

BEFORE: WEICK, LIVELY, and JONES, Circuit Judges

Charles Anderson has filed a motion for stay pending appeal of the judgment of the Eastern District of Michigan. In its order of November 20, 1980, the district court granted Cornell Fuller's application for a writ of habeas corpus, 28

U.S.C. §2254. Because the district court granted petitioner's motion for bail pending appeal, Fuller was released from custody on January 7, 1981. Thus, Anderson's motion was restyled as a motion to modify a custody order. Fed. R. App. P. 23(d).

It is well settled that "pending appeal by the custodian of a prisoner who has successfully obtained a writ of habeas corpus the prisoner is presumptively entitled to release." *United States v. Rundle*, 461 F.2d 768 (3rd Cir. 1972), Fed. R. App. P. 23(c). Though the ultimate question to be decided in this court's ruling on the merits of the habeas corpus appeal is Fuller's freedom, our present inquiry is much less awesome. Fed. R. App. P. 23 limits the discretion of appellate courts to modify initial orders respecting the custody of prisoners. *Jago v. United States District Court, Northern District of Ohio*, 570 F.2d 618, 625 (6th Cir. 1978). Absent a showing of "special reasons", the decision of the district court governs review in this court. *Id.*; Fed. R. App. P. 23(d). Anderson has failed to meet this burden.

Accordingly, the respondent's motion is DENIED.

ENTERED BY ORDER OF THE COURT

John P. Hehman /s/
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

| | |
|---|---|
| CORNELL FULLER,<br>Petitioner,<br>v.<br>CHARLES E. ANDERSON,<br>Respondent. | Civil No. 79-73171 |

**ORDER GRANTING BAIL PENDING APPEAL**

At a session of said Court, held in the United States Courthouse, City of Detroit, County of Wayne, State of Michigan, on the sixth day of January, 1981.

Present: The Honorable John Feikens Chief United States District Judge.

Upon motion of the Petitioner, Cornell Fuller;

IT IS HEREBY ORDERED that the Petitioner, Cornell Fuller, be granted release during the pendency of any appeal, provided that he execute a bond in the amount of $10,000.00 and deposit in the registry of the Court the sum of $1,000.00 in security, as evidenced by the assignment of an interest in property by his mother, Hattie Fuller, more particularly described as Lot 264 MARSHLAND BOULEVARD SUB. recorded in Liber 26, Page 92 of Plats, Wayne County Records, and known as 840 Marlborough, and subject to a mortgage to Graham Mortgage Company, such deposit to be returned

upon the Court's determination that the Petitioner has performed the conditions of his release.

John Feikens /s/
John Feikens
Chief United States District Judge

January 6, 1981

[395 MICH at 453]

WILLIAMS, J. This court has steadfastly supported the right of the trier of fact, particularly the jury, to believe, or disbelieve, in whole or in part, any of the evidence presented. The instant case involves this doctrine.

As my brother the Chief Justice in his opinion observes, "There was uncontradicted testimony that 16-year-old Zerious Meadows started the fire by throwing a Molotov cocktail, and by striking a match." However, as he correctly notes, the question before us is not whether defendant Cornell "Fuller planned the arson, or that he lit the fire, but rather that he acted as a lookout for Meadows by standing by the back gate of the yard and looking up and down the alley."

In our opinion, evidence was presented which, if believed by the jury, would show just that. This is

[395 MICH at 454]

not a case of "mere presence at the scene", for, if the jury believed it, defendant's activities were consonant with a theory of active participation in the crime.

The Chief Justice in his opinion carefully lays out the testimony of the important witnesses. There is no need to repeat this material in this opinion.

The jury could connect Fuller with Meadows who perpetrated the arson, because, as the Chief Justice summarized,

> "One witness testified she saw five or six boys huddled together on the sidewalk in front of the Turner home before it burned. She identified one of the boys as Fuller. She said she saw him go through the gate to the back yard of the Turner home. She saw another of the boys in front throw something at the house and the house caught fire. She identified one of the other boys as a boy named 'Jefferey'."

This boy was Jefferey Coleman, whose testimony, well set out by the Chief Justice, described Fuller's role in the crime. Even if we eliminate Jefferey Coleman's speculation that "I guess he [Fuller] was watching out for Zerious", he still testified that defendant was looking back and forth "to Jefferson" and "back towards Kercheval" several times and that after the fire started, Fuller and Meadows together took off and ran toward Kercheval.

Another witness, Gary Martin, in the words of the Chief Justice, "testified that he saw Cornell Fuller, Zerious Meadows and four others walking together in the alley between Fairview and LeMay going towards Jefferson. He said he next saw Fuller and Meadows run through a yard and then run down to Kercheval through the alley."

[395 MICH at 455]

It is for the trier of fact to determine if the prosecution has "negate[d] every reasonable theory consistent with the defendant's innocence of the crime charged". It was so determined in this case.

Conviction affirmed.

COLEMAN and FITZGERALD, JJ., concurred with WILLIAMS, J.

LINDEMER and RYAN, JJ., took no part in the decision of this case.

T. G. KAVANAGH, C.J., (*dissenting*). Cornell Fuller was convicted of first-degree felony murder, MCLA 750.316; MSA 28.548, by a jury.

Because we are satisfied after a thorough review of the record that there was insufficient evidence to support conviction, we set this verdict aside.

On May 18, 1970, two young girls lost their lives in a fire asserted to be caused by arson. There was uncontradicted testimony that 16-year-old Zerious Meadows started the fire by throwing a Molotov cocktail, and by striking a match. The prosecution did not allege that Fuller planned the arson, or that he lit the fire, but rather that he acted as a lookout for Meadows by standing by the back gate of the yard and looking up and down the alley.

One witness testified she saw five or six boys huddled together on the sidewalk in front of the Turner home before it burned. She identified one of the boys as Fuller. She said she saw him go through the gate to the back yard of the Turner home. She saw another of the boys in front throw something at the house and the house caught fire. She identified one of the other boys as a boy named "Jefferey". She testified she did not see anything unusual at the rear of the Turner home because she could not see that far.

[395 MICH at 456]

Fourteen-year-old Jefferey Coleman testified that he saw Zerious Meadows, on the back porch with a Coca Cola bottle

in his hand, light a rag in the bottle and throw it against the porch. He said he saw Cornell Fuller "standing by the gate" in the back yard. The following colloquy then occurred:

"Q. Now after he [Meadows] had struck the match and started the second fire what happened then?

"A. Well, he had jumped off the porch and then they ran down the alley towards Kercheval.

"Q. When you say they ran down the alley, who ran down the alley?

"A. Zerious and Cornell.

"Q. Towards Kercheval.

"A. Yes, sir.

"Q. During the time that Zerious Meadows was throwing the bottle against the side of the house or against the side of the porch and lighting the match which set—started the second fire did you see what Cornell Fuller was doing?

"A. He was still standing by the gate, looking around.

"Q. When you say he was looking around what, exactly, was he doing?

"A. I guess he was watching out for Zerious—he had looked to Jefferson and he looked back towards Kercheval.

"Q. He looked towards Jefferson and looked back towards Kercheval?

"A. Yes, sir.

"Q. Did he do that once or more than once?

"A. He did it more than once.

"Q. He did it more than once—how many times—

"The Court: Was this the alley gate or the gate toward the front of the house?

"A. It was the alley gate.

"Q. How many times would you say Cornell Fuller looked towards Jefferson and then looked back towards Kerchevel?

"A. I wouldn't know.

[395 MICH at 457]

"Q. But it was more than once; is that correct?

"A. Yes, sir.

"Q. Was it more than twice?

"A. Yes, sir.

"Q. Now, during the time that this was taking place, Jefferey, did you hear any words spoken between Zerious and Cornell?

"A. No.

"Q. Did you say anything to them?

"A. No.

"Q. Now, after—strike that, please—after the second fire began, you testified that Zerious and Cornell left the backyard; is that correct?

"A. Yes, sir.

"Q. Did they enter the alley?

"A. Yes, sir.

"Q. Did they enter the alley through the gate that Cornell Fuller was standing by?

"A. Yes, sir.

"Q. And then they started running; is that correct?

"A. Yes, sir.

"Q. Were they running together or separately, Jefferey?

"A. Together.

"Q. And they were running towards Kercheval; is that correct?

"A. Yes, sir.

Gary Martin testified that he saw Cornell Fuller, Zerious Meadows and four others walking together in the alley between Fairview and LeMay going towards Jefferson. He said he next saw Fuller and Meadows run through a yard and then run down to Kercheval through the alley.

The testimony summarized above was the entire evidence linking Cornell Fuller with the arson and resulting deaths. At the conclusion of the prosecution's case, Fuller's attorney moved for a directed

[395 MICH at 458]

verdict of acquittal. The trial judge in denying the motion said:

> "The Court: The question in this case is a close one. As I regard the testimony the defendant's complicity in the case depends almost completely on the fact that he was present at the scene of the crime and that he was seen going to it and seen running afterwards. There was very meagre evidence to call him a look-out in this particular case; however, the Court is of the impression that we do have a borderline prima facie case in this instance—a borderline prima facie case—and, accordingly, the court will reserve its ruling on the motion for a directed verdict. It seems to me that the testimony is the kind that would be—that there would be a high probability that the jury would return a verdict of not guilty in this case, but where there is a prima facie case the Court cannot speculate on it—on the jury's decision in the case and the Court will, however, reserve a ruling on the motion."

After the jury returned a guilty verdict, a motion to set aside that verdict as against the great weight of the evidence was denied.

The record does not contain sufficient evidence to support a conviction of felony murder against this defendant. In a prosecution for felony murder, the felony must be proven independently of the murder. *People v Allen*, 390 Mich 383; 212 NW2d 21 (1973). Arson is a specific intent crime, and proof of the corpus delicti requires the showing not only that the building was burned but that the fire was intentionally set. *Peterson v Oceana Circut Judge*, 243 Mich 215; 219 NW 934 (1928). There was inadequate proof of Fuller's intention to act in concert with Zerious Meadows to set this fire.

The prosecution did not contend that Fuller assisted in planning this arson; they argued rather that he acted as a "lookout" for Meadows, *i.e.*, that

he was an "aider and abettor". The fact that Fuller and Meadows were seen together—that Fuller was seen by the alley "standing by the gate, looking around" does not establish his being a lookout for an arsonist.

Jeffrey Coleman's *speculation* as to what Fuller was doing—"I guess he was watching out for Zerious—he had looked to Jefferson and he looked back towards Kercheval"—is not sufficient to allow a conclusion to be drawn that Fuller *was* acting as a lookout. In *People v Davenport*, 39 Mich App 252, 257-258; 197 NW2d 521 (1972), it was said:

> "It has been said that in a criminal case 'not only must each of the facts from which the inference is drawn be proved beyond any reasonable doubt, but the inference itself must be such as admits of no other rational conclusion'. *People v Sessions*, 58 Mich 594, 606 (1886) (per Sherwood, J). Accord: *Miller v State*, 250 Ind 338; 236 NE2d 173 (1968): 'An inference, to be valid, must be logical [citation omitted]. It must follow as an impelling certainty from the circumstantial evidence which mothers it, or it is not proper.' Similarly, see *State v Faircloth*, *supra* [181 Neb 333; 148 NW2d 187 (1967)].
>
> "Allowing a trier of fact to draw an inference in a criminal case only if the inference follows with 'impelling certainty' enforces the requirement that, where the people's case is based on circumstantial evidence, the prosecution must negate every reasonable theory consistent with the defendant's innocence of the crime charged."

There are simply too many inferences that would have to be drawn, one piled upon another, to justify conviction of

this defendant. The prosecution has not negated "every reasonable theory consistent with the defendant's innocence of the crime charged". The due process clause "protects the accused against conviction except upon proof

[395 MICH at 460]

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

Fuller's presence at or near the scene of this crime will not support a conclusion of his direct participation or of aiding and abetting.

> "'Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval sufficient, nor passive acquiescence or consent.'" *People v Burrel*, 253 Mich 321, 323; 235 NW 170 (1931).

In *Burrel*, defendant and one Bracken picked up a girlfriend of Bracken's in defendant's automobile. Defendant, as directed by Bracken, parked the car while Bracken had sexual intercourse with the underage girl in the back seat. Defendant sat in the front seat with his arms over the steering wheel and his head resting on his arms. Defendant was convicted of statutory rape as an aider and abettor.

That conviction was reversed because there was no evidence to show that defendant knew when he took Bracken and the girl into his car and before parking that Bracken intended statutory rape, and "[i]f it be inferred that, after stopping the car, he knew what his guests were doing in the back of the car, it makes no difference * * *". *Id.*

So it is in the case at bar. There is no evidence that defendant knew that Meadows planned to set fire to the Turner house. There is no evidence that defendant agreed to assist Meadows in burning the house.

While defendant may have been in a position to

[395 MICH at 461]

observe what Meadows was doing or to warn him of danger, from this fact alone it is not reasonable to conclude that he agreed to act as a lookout or that he did in fact assist Meadows in perpetrating the crime.

We would reverse the conviction and discharge the defendant.

LEVIN, J., concurred with T. G. KAVANAGH, C.J.

PEOPLE v FULLER

[44 Mich App at 298]

Before: QUINN, P.J., and V. J. BRENNAN and O'HARA,* JJ.

QUINN, P.J. A jury convicted defendant of first-degree murder, MCLA 750.316; MSA 28.548, and he was sentenced. His application for delayed appeal was granted.

On May 18, 1970, a residential fire occurred at 1554 Lemay in Detroit which claimed the lives of two young girls. A cause of the fire was a Molotov cocktail thrown at the residence by one Meadows. The prosecution claimed that defendant

*Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

aided and abetted Meadows by acting as a lookout while the latter threw the Molotov cocktail. Other facts will

[44 Mich App at 299]

be noted in the discussion of the issues raised on appeal.

The first issue is a weight of the evidence question. Our inquiry is, was evidence produced which, if believed, could certainly lead to a reasonable inference that defendant was a party to the offense?, *People v Ford*, 19 Mich App 519 (1969). There was evidence that defendant came to the scene with Meadows and others; that defendant stood at a gate near the alley behind the house while Meadows lit and threw the Molotov cocktail; that during this time, defendant looked up and down the alley more than once; and that defendant ran from the scene with Meadows. From these facts a jury could reasonably infer that defendant was a party to the offense.

During final argument, the prosecuting attorney commented on the failure of defendant to produce additional alibi witnesses. Defendant now claims that this constitutes an impermissible inference of guilt. No objection to the comment was made at trial. The defense was alibi and the one alibi witness produced named others who were present when defendant was allegedly in the presence of the alibi witness. It was not shown that the others were unavailable. That the comment complained of was proper see *People v Falkner*, 36 Mich App 101 (1971).

We find no merit in defendant's contentions that the trial court affirmatively mislead the jury with respect to sentence and that sentence constituted cruel and unusual punishment.

At trial, defendant offered to stipulate that a burning took place and that two deaths occurred as a result thereof. The

prosecuting attorney declined the offer and put in his proof of these facts. Defendant asserts error because he claims the

[44 Mich App at 300]

prosecuting attorney's refusal permitted prejudicial and unnecessary evidence to be heard by the jury. The refusal to accept the offer cannot be the basis of error, however. As stated in *People v MacPherson*, 323 Mich 438 (1949):

> "Furthermore, the prosecutor had the right to prove by competent testimony the facts material to the people's case. Counsel for defendant could not preclude the exercise of such right by undertaking to make an admission on behalf of his client."

The testimony of witness Coleman was crucial to the prosecution. It is apparent from the record that Coleman had a juvenile record, in addition to his current record of being in the youth home for running away from home. Defendant concedes that no request for this record was made to the prosecuting attorney. The record does not disclose that the prosecuting attorney had Coleman's past juvenile record or that the prosecuting attorney knew of this record. Defendant now contends that his due process rights were violated because the prosecuting attorney failed to disclose a record it is not shown the prosecuting attorney had or knew about. If the trial record disclosed that the prosecuting attorney had, controlled, or knew of Coleman's past juvenile record, we would reverse, *People v Nettles*, 41 Mich App 215 (1972). Absent a showing that the prosecuting attorney possessed, controlled, or knew of the past juvenile record or that defendant requested its production no violation of his rights is shown.

In addition, on cross-examination of Coleman, defense counsel voluntarily stopped the cross-examination after Cole-

man had acknowledged that his current residence was the youth home and that he was there as a runaway. Further inquiry could well have disclosed the prior juvenile record.

[44 Mich App at 301]

During Coleman's testimony, he gave the unresponsive conclusion that Fuller was "watching out for Zerious [Meadows]". No objection was made to this conclusionary statement. The issue was not preserved for appeal.

Affirmed.

All concurred.

[421] • • •

THE COURT: The motion will be denied.

This case was tried by a jury and the Court, of course, also heard the testimony in the case and would find that there was testimony in this case not only making Out a prima facie case but justifying the jury in finding facts along the following lines:

That, on the morning in question, the defendant, Cornell Fuller, in company with a number of other young men and, particularly, one 16 year old juvenile, came to the house where the arson-murder is alleged to have taken place and that the evidence is sufficient to indicate that at that time they brought with them a device consisting of a Coca Cola bottle filled with gasoline and with a cloth or paper wick which is commonly known as a firebomb or "Molotov Cocktail."

The evidence does not indicate in the case where this device was made but the evidence would [422] indicate that it was not made at the scene of the crime because there was no

container disclosed in the evidence for the gasoline in the case. The young men went to the front of the house that was burned and some of them were seen by witnesses to go into the backyard, including the 16 year old juvenile, who was identified as the one who lit and actually threw the firebomb against the house; the defendant, Cornell Fuller, who was present in the yard, was identified as a look-out or accessory.

Now, in view of the fact that this firebomb was obviously constructed at some other point before it was brought into the backyard and thrown into the house or onto the House, all persons who came with the juvenile and who helped to bring the firebomb could, and the jury could have found, that they participated in this particular crime and, particularly, the defendant, Cornell Fuller, who was in the backyard and who was observed looking up and down the alley and who, after the burning of the house, ran away with the juvenile who actually threw the bomb—the firebomb.

The Court submitted the case to the jury on the question that under the facts of the case the [423] defendant, Cornell Fuller, having been present and participated, and having participated in the burning of the house was, under the statute, which is Section 767.39, chargeable as a principal, the same as the man who actually threw the firebomb in this case.

The testimony in the case, of course, indicated the terrible results of the throwing of the firebomb; the house was burned; a large family was forced to flee; the two young girls who were in the attic were burned to death. The other members of the family were forced to jump from the second floor and some of them were burned and injured, and it was a tragic circumstance.

The Court would find that there was sufficient evidence to submit the case to the jury on the People's theory of the

case. The jury found that the defendant was guilty of murder in the first degree and your motion will, accordingly, be denied, Mr. Reilly.

MR. REILLY: Thank you, your Honor.

• • •

STATE OF MICHIGAN
IN THE RECORDER'S COURT OF
THE CITY OF DETROIT

| | |
|---|---|
| THE PEOPLE OF THE STATE OF MICHIGAN<br>Vs.<br>CORNELL FULLER,<br>Defendant. | Docket<br>No. 70 03305 |

**OPINION & ORDER DENYING MOTION FOR NEW TRIAL, SUPPLEMENTAL MOTION FOR NEW TRIAL, AND MOTION FOR PRODUCTION OF CONTACT REPORTS**

At a session of said Court, held in the Frank Murphy Hall of Justice, at Detroit, Wayne County, Michigan, on Dec. 15, 1971.

PRESENT: HON. THOMAS L. POINDEXTER, Judge of Recorder's Court.

In this case the defendant, Cornell Fuller, was tried on a charge of arson murder in the first degree and was found guilty by a jury in this case.

It was not contended that the defendant was the one who threw the fire bomb which burned the house, but the evidence

established that he was the look-out while Zerious Meadows (subsequently tried in a separate case on this same charge) threw the fire bomb and set a fire by pouring gasoline on the dwelling in question.

Defense counsel in his Motion for a New Trial makes much of the fact that Cornell Fuller was only seen to run to the alley of the premises here involved and look up and down the alley, but the evidence also indicated that he was the look-out and, therefore, an accessory to the crime, equally chargeable as a principal under Section 767.26, Compiled Laws, 1948.

This motion was held for some time by the Court pending the trial of Zerious Meadows on the same charge but in a separate case. At the time of the trial of Cornell Fuller, Zerious Meadows, a 16 year old boy, was not bound over for trial by the Juvenile Court and could not be tried in the first case for the death of the young girl there involved.

After the trial of Cornell Fuller a second charge was placed against Zerious Meadows for the death of a second young girl in the burning of the same premises involved in the Fuller case, and Zerious Meadows has since been convicted of murder in the first degree in a trial by jury before a different Court. The reason the Court held this matter was that it seemed only fair that if there should be an acquittal, or a conviction on a lesser offense, in the trial of Zerious Meadows that Cornell Fuller, as the accessory, should not be punished for a higher degree of offense than Zerious Meadows. Both have now been found guilty of murder in the first degree.

Nobody has attempted to point out any errors in the charge of the Court, or in the manner of the conduct of the trial; however, Defense Counsel now, as part of his motion for a new trial, asks that the Prosecuting Attorney be required to

furnish contact reports from the Juvenile authorities, relating to two of the juvenile witnesses in this case.

This motion is denied for the reasons contained in the brief of the Prosecuting Attorney, and also in the attaached memorandum prepared by Mr. Lynn L. Lower, Legal Research Aide of this Court, who has prepared an extensive memorandum which clearly sets forth the issues of law that this Court adopts as the Opinion of the Court in relation to the contact reports.

*The Motions are, accordingly, DENIED.*

THOMAS L. POINDEXTER /s/
Judge of Recorder's Court

(Attachment)

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NO. 81-855

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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CHARLES ANDERSON, Warden,

Petitioner,

-vs-

CORNELL FULLER,

Respondent.

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

---

The Respondent, CORNELL FULLER, asks leave to file the attached "Brief for the Respondent in Opposition" without prepayment of costs and to proceed in forma pauperis pursuant to Supreme Court Rule 46.1. The Respondent proceeded in forma pauperis in this manner in both the United States District Court, Eastern District of Michigan, Southern Division, and in the United States Court of Appeals for the Sixth Circuit. His financial situation has not since improved.

Respectfully submitted,

FEDERAL DEFENDER OFFICE

Kenneth R. Sasse

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10

Dated: December 7, 1981

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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CHARLES ANDERSON, Warden,

Petitioner,

V

CORNELL FULLER,

Respondent.
_____/

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

# BRIEF FOR RESPONDENT IN OPPOSITION

KENNETH R. SASSE

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600 Wodward Ave., 11th Floor
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## QUESTION PRESENTED

WHETHER THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY HELD THAT RESPONDENT WAS ENTITLED TO HABEAS CORPUS RELIEF, WHERE, UPON THE RECORD EVIDENCE ADDUCED AT TRIAL, NO RATIONAL TRIER OF FACT COULD HAVE FOUND PROOF OF GUILT BEYOND A REASONABLE DOUBT.

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No. 81-855

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

---

CHARLES ANDERSON, Warden,

Petitioner

V.

CORNELL FULLER,

Respondent.

---/

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Respondent's conviction was affirmed by the state courts in People v. Fuller, 44 Mich. App. 297, 205 N.W.2d 287 (1973) and People v. Fuller, 395 Mich. 451, 236 N.W.2d 58 (1975). (Pet. App. 40a, 31a)[1]

The opinion of the United States District Court for the Eastern District of Michigan, granting respondent's petition for a writ of habeas corpus, is unreported. (Pet. App. 20a) The opinion of the United States Court of Appeals for the Sixth Circuit, affirming this decision, is not yet reported. (Pet. App. 1a).

JURISDICTION

Respondent accepts petitioner's statement of jurisdiction.

---

1. "Pet App." refers to the appendix filed by petitioner in this Court.

## STATUTES INVOLVED

MCLA 750.71 (MSA 28.266) provides:

> The term 'burn' as used in this chapter shall mean setting fire to, or doing any act which results in the starting of a fire, or aiding, counseling, inducing, persuading or procuring another to do such act or acts.

MCLA 750.72 (MSA 28.267) provides:

> Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony punishable by imprisonment in the state prison not more than 20 years.

MCLA 750.316 (MSA 28.548) provides:

> All murder which shall be perpetrated by means of poison, or lying in wait or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.

MCLA 767.39 (MSA 28.979) provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

## COUNTERSTATEMENT OF THE CASE

1. On the morning of May 18, 1970 a fire at a Detroit, Michigan residence claimed the lives of two young girls. Cornell Fuller, respondent herein, was charged by criminal information, filed on June 1, 1970, with the first

degree murder of one of the girls, 12-year-old Ruth Turner. The information charged that Fuller killed Ruth Turner during the perpetration of arson, in violation of MCLA 750.316.

The trial of Cornell Fuller, age 17, commenced on October 7, 1970 in the Recorder's Court for the City of Detroit. The State did not allege that Fuller started the fire or even assisted in the planning. Rather, the State theorized that Fuller was a "look-out" and thus equally guilty as the principal.[2] (C/A App. 17a-18a) See MCLA 767.39.

The testimony of a Detroit Fire Department captain established that the fire originated in the rear of the residence. It appeared the fire was deliberate and that actually two fires had been set. (C/A App. 40a-41a) A bottle with gasoline, commonly called a "Molotov Cocktail", could have been used to start the fire. (C/A App. 42a)

A Detroit Fire Department senior chemist testified that he had been able to identify leaded gasoline from debris taken from the scene of the fire. (C/A App. 43a-44a)

Detroit Police Department patrolmen testified concerning the rescue attempts they made. (C/A App. 37a-39a)

A Wayne County Morgue pathologist testified regarding his autopsy of the body of Ruth Turner; he established the fire as the cause of her death. (C/A App. 36a)

Safronia Turner, mother of the deceased girls, and her son, Steven, testified concerning events surrounding the fire. (C/A App. 59a-69a)

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2. "C/A App" refers to the joint appendix filed in the Court of Appeals.

Jefferey Coleman, 14-years-old, was the primary prosecution witness. At the time of trial he resided in the Wayne County Youth Home because he had run away from home. Coleman testified he was in a special school, having attended regular school until "about the third grade." (C/A App. 73a, 92a-93a)

On the morning of May 18, 1970, Coleman testified, he left his home at about 8:00 a.m. and went to the home of Gary Martin. (C/A App. 70a) He next proceeded toward Stevie Turner's house, approximately seven or eight houses from Gary Martin's home. (C/A App. 75a-76a) He testified he went to the backyard of "Miss Paula's house," next door to the Turner house. (C/A App. 77a) There, according to Coleman, he saw Zerious Meadows on the porch of the Turner house with a Coca-Cola bottle in his hand. (C/A App. 78a) According to Coleman, Cornell Fuller was in the backyard standing by the gate. (C/A App. 79a)

Jefferey Coleman testified he stood and watched for five or ten minutes. (C/A App. 94a-95a) He testified that Zerious Meadows, age 16, lit a rag in the Coke bottle and threw the bottle against the porch where it broke. (C/A App. 80a) Meadows then struck a match and started a second fire on the porch. (C/A App. 83a)

The only evidence of participation by Cornell Fuller is indicated in the following testimony of Jefferey Coleman:

> Q: Now after he [Meadows] had struck the match and started the second fire, what happened then?
>
> A: Well, he had jumped off the porch and then they ran down the alley towards Kercheval.
>
> Q: When you say they ran down the alley, who ran down the alley?
>
> A: Zerious and Cornell.
>
> Q. Towards Kercheval.
>
> A: Yes, sir.

Q: During the time that Zerious Meadows was throwing the bottle against the side of the porch and lighting the match which set--started the second fire did you see what Cornell Fuller was doing?

A: He was still standing by the gate, looking around.

Q: When you say he was looking around what, exactly, was he doing?

A: I guess he was watching out for Zerious--he had looked to Jefferson and he looked back towards Kercheval.

Q: He looked towards Jefferson and looked back towards Kercheval?

A: Yes, sir.

Q: Did he do that once or more than once?

A: He did it more than once.

THE COURT: Was this the alley gate or the gate toward the front of the house:

A: It was the alley gate.

Q: How many times would you say Cornell Fuller looked towards Jefferson and then looked back towards Kercheval?

A: I wouldn't know.

Q: But it was more than once; is that correct?

A: Yes, sir.

Q: Was it more than twice?

A: Yes, sir.

Q: Now, during the time that this was taking place, Jefferey, did you hear any words spoken between Zerious and Cornell?

A: No.

Q: Did you say anything to them?

A: No.

Q: Now, after--strike that, please-after the second fire began, you testified that Zerious and Cornell left the backyard; is that correct?

A: Yes, sir.

Q: Did they enter the alley?

A: Yes, sir.

Q: Did they enter the alley through the gate that Cornell Fuller was standing by?

A: Yes, sir.

Q: Were they running together or separately, Jefferey?

A: Together.

A: And they were running towards Kercheval is that correct?

A: Yes, sir.

(C/A App. 83a-86a)

Jefferey Coleman further testified he became frightened and ran back to Gary Martin's house after the fire started. (C/A App. 86a, 96a) Subsequently, he stopped a police car, told the officers the house was on fire, and then returned to the house. (C/A App. 86a)

Helen Brownlee testified that on May 18, 1970 she lived next door to the Turner home. (C/A App. 46a) Shortly before 9:00 a.m., she saw five or six boys, ages 14, 15, or 16, "in a huddle" in front of the Turner house. (C/A App. 48a, 54a) She could not hear what was being said. (C/A App. 49a) Mrs. Brownlee identified Cornell Fuller as one of the boys she saw. (C/A App. 49a) She had seen Fuller "more than once" before with a crowd of boys playing next door.

Mrs. Brownlee testified she saw two or three of the boys, includiing Cornell Fuller, go to the back of the Turner house. (C/A App. 50a) She then saw a "shiny object" being thrown by one of the boys in the front of the house. It sounded like glass shattering. (C/A App. 51a) Mrs. Brownlee, believing a window in her own house had been broken, went outside. She found the Turner house on fire. (C/A App. 52a-53a)

Mrs. Brownlee testified she was uncertain whether Jefferey Coleman was with the five or six boys she saw huddled together. She testified she had seen him, however, three or four times earlier that morning and was positive she had seen him standing out front when she sent her children to school a few minutes before the fire started. (C/A App. 55a-57a)

A Detroit Police Department detective sergeant testified he had interviewed Mrs. Brownlee the day after the fire. She had not identified anyone at that time. The officer admitted that her in-court testimony was a surprise to him. (C/A App. 115a)

Gary Martin, age 15, testified he saw Jefferey Coleman about 8:00 a.m. on May 18, 1970. (C/A App. 100a) Several minutes after Coleman left his house, Martin saw six boys including Cornell Fuller and Zerious Meadows, walk past his house. (C/A App. 103a-105a, 114a) Martin later saw the same group coming from the opposite direction. (C/A App. 108a) First they were walking; then they began to run. (C/A App. 109a) Later, Jefferey Coleman returned to his house and reported that Stevie Turner's house was on fire. (C/A App. 112a)

Hattie Fuller, mother of Cornell Fuller, was the only defense witness. She testified her son was home sleeping until about 9:00 a.m. on the morning of May 18, 1970. (C/A App. 126a-130a)

2. At the conclusion of the state's case, a motion for directed verdict of acquittal was heard. The trial court noted, "There was very meager evidence to call him a look-out in this case" and that "there would be a high probability that the jury would return a verdict of not

guilty in this case." The court reserved ruling on the motion, however, because "we do have a borderline prima facie case in this instance." (C/A App. 120a-121a)

On October 30, 1970, prior to the sentencing of Cornell Fuller, his counsel moved to set the guilty verdict aside on the ground the evidence was insufficient to uphold the conviction. This motion was denied. (Pet. App. 43a-45a)

A motion for a new trial, founded on various grounds including the insufficiency of the evidence, was denied in an opinion and order entered on December 15, 1971. (Pet. App. 45a-47a)

3. Cornell Fuller was sentenced, on October 30, 1970, to solitary confinement at hard labor in the state prison for life. (C/A App. 146a-147a)

4. The Michigan Court of Appeals reviewed Fuller's conviction in People v. Fuller, 44 Mich. App. 297 (1973). On the question of the sufficiency of the evidence, the court stated, "Our inquiry is, was evidence produced which, if believed, could certainly lead to a reasonable inference that defendant was a party to the offense?" Id., at 299. The court affirmed the conviction. (Pet. App. 40a-43a)

5. The Michigan Supreme Court upheld Cornell Fuller's conviction in People v. Fuller, 395 Mich. 451 (1975). In apparent response to the dissent's contention that the due process clause required "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," and the dissent's argument that the prosecution had not negated "every reasonable theory consistent

with the defendant's innocence of the crime charged," Id., at 459-461, the majority stated: "It is for the trier of fact to determine if the prosecution has 'negate[d] every reasonable theory consistent with the defendant's innocence of the crime charged.' It was so determined in this case." Id., at 455. (Pet. App. 31a-40a).

6. On November 20, 1980, an "Order Granting Petition For A Writ Of Habeas Corpus" was entered by Chief Judge John Feikens of the United States District Court for the Eastern District of Michigan. (Pet. App. 20a-28a) In his "Memorandum Opinion," the judge discussed the evidence presented, the relevant Michigan law, and the standard of review announced in Jackson v. Virginia, 443 U.S. 307 (1979). He concluded:

> The evidence outlined above cannot constitutionally sustain a finding that the petitioner had either of the elements of intent required by Michigan law. The evidence establishes only that the petitioner was with Zerious Meadows and other boys before and after the fires were started, and that the petitioner was looking around while Meadows started them. This suggests, as Jefferey Coleman surmised, that the petitioner may have been acting as a lookout for Meadows. It is reasonable speculation. But could a rational jury find it to be proof beyond a reasonable doubt? No evidence was presented that the petitioner intended to burn the Turner home. The evidence that he knew what Zerious Meadows planned to do is simply too meager to support conviction. The state has failed to meet the constitutional burden imposed by In re Winship, and no rational jury could conclude that it succeeded.

"Memorandum Opinion" at 5-6 (Pet. App. 26a) (emphasis in original)

7. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court. (Pet. App. 1a-19a) After quoting the standard set forth in Jackson

v. Virginia, 443 U.S. 307, 324 (1979), the Court of Appeals stated:

> In applying this standard in habeas cases, the federal courts must review the evidence in the light most favorable to the prosecution. The petition must be denied if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." The district court recognized that conflicts in the evidence must be resolved in favor of the State, but nevertheless found that the evidence introduced at trial was too meager to support the petitioner's conviction. We agree with the district court's conclusion

Fuller v. Anderson, ___ F.2d ___ (6th Cir. 9/18/81) (slip. op. at 7) (Pet. App. 8a-9a) (citations omitted)

The Court of Appeals opinion concluded:

> The only direct evidence supporting the State's contention that Fuller "stood guard and acted as a lookout" for Zerious Meadows was Jefferey Coleman's testimony that over a period of several minutes Fuller turned his head from side to side "more than twice." We agree with the district court that this is insufficient to establish beyond a reasonable doubt that Fuller took conscious action to aid Meadows' commission of arson.

Fuller v. Anderson, supra. (slip op. at 9) (Pet. App. 11a)

8. By order of the District Court entered January 6, 1981, as affirmed by the Court of Appeals, Cornell Fuller has been released on bond pending the State's appeals. (Pet. App. 28a-31a)

## REASONS FOR DENYING THE WRIT

**The Court of Appeals and the District Court correctly held that respondent was entitled to habeas relief where, upon the record evidence adduced at trial, no rational trier of fact could have found proof beyond a reasonable doubt.**

Petitioner contends the lower courts erred in granting respondent habeas relief. Petitioner claims there was sufficient evidence adduced at respondent's state court trial to permit a rational trier of fact to find proof beyond a reasonable doubt of aiding and abetting an arson-murder.

1. Evidence of Cornell Fuller's presence at the scene of the fire was not overwhelming. There are questions as to the credibility of each of the three witnesses who testified to having seen Cornell Fuller at or near the Turner home on the morning of the fire. Conflicts exist among the testimony of the witnesses. Additionally, Hattie Fuller testified her son was at home throughout the relevant time period.

As required by Jackson v. Virginia, 443 U.S. 307 (1979), however, the District Court and the Court of Appeals resolved all factual disputes in the light most favorable to the prosecution. The testimony of the next-door neighbor, Helen Brownlee, that she saw Cornell Fuller near the house, with several other teenage boys, was accepted by the lower courts. The testimony of 15-year-old Gary Martin, that he saw Cornell Fuller with a group of boys heading toward the Turner house and, later, walking and then running in the opposite

direction, was likewise accepted. The relevant testimony of 14-year-old Jefferey Coleman was reported verbatim in the opinions and accepted as fact by both courts.

The District Court and the Court of Appeals fully credited the State's witnesses. Both Court's nevertheless concluded that testimony that Cornell Fuller looked toward Jefferson Avenue and then looked back toward Kercheval Avenue "more than twice" (C/A App. 85a) during the five to ten minutes that Jefferey Coleman watched (C/A App. 94a-95a) was simply not sufficient for a rational factfinder to accept as proof beyond a reasonable doubt of participation in the criminal offense.

Accepting the State's evidence, Cornell Fuller was one of seven teenaged boys, including Jefferey Coleman, present at or near the Turner home at the time of the fire. He was one of seven boys, including Coleman, who ran from the house after the fire started.

There was no evidence Cornell Fuller planned the arson. There was no evidence he furnished or ever possessed the gasoline, coke bottle, rag, or matches used to ignite the fire. There was no evidence he assisted in the arson. There was no evidence he in any way encouraged the commission of the arson. Likewise, there was no evidence he knew any member of the Turner family or that he had any motive to harm any member of the family or their residence.

The crux of the case against Cornell Fuller was the testimony of Jefferey Coleman that Fuller looked back forth "more than twice." According to the State, this testimony established him as a "look-out." This conclusion, without further evidentiary support, is pure conjecture. It falls far short of the proof beyond a reasonable doubt constitutionally required to support the conviction of Cornell Fuller for the crime alleged.

2. In a prosecution for felony-murder in the State of Michigan, the felony must be proved independently of the murder. People v. Allen, 39 Mich. App. 483, 499 (1972) (Levin, P.J., dissenting) adopted 390 Mich. 383 (1973). To establish the charge that murder was committed in the perpetration of an arson, the prosecution must prove that a building was burned, that the fire was intentionally or willfully set, and that a person died as a result of the fire. Peterson v. Oceana Circuit Judge, 243 Mich. 215, 217 (1928); People v. Belcher, 29 Mich. App. 341, 343 (1971); MCLA 750.72.

A defendant, to be an aider and abettor, to an offense, under Michigan law, must know that the activity condemned by the law is actually occurring and must intend to help the perpetrator. "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider and abettor or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiescence or consent." People v. Burrel, 253 Mich. 321, 323 (1931), quoting 1 Cyc. Crim. Law (Brill), § 233; People v. Casper, 25 Mich. App. 1, 5 (1970).

One aids and abets another in committing a crime when the former takes conscious action to make the criminal venture succed. People v. Cooper, 326 Mich. 514 (1950); People v. Gordon, 60 Mich. App. 412, 418 (1975). The aider and abettor of a specific intent crime must be shown to have rendered his aid and assistance to the principal actor with the knowledge that the principal himself possessed the intent necessary to be guilty of the crime. People v. Rigsby, 92 Mich. App. 95, 97-98 (1979); People v. Gordon, supra; People v. Poplar, 20 Mich. App. 132 (1969).

In summary, to be guilty of aiding and abetting a specific intent crime, such as arson, it is not enough for

the prosecution to establish that the defendant was present and mentally approved of the offense. Nor is it sufficient to prove that the defendant rendered assistance without proof of intent or knowledge. The prosecutor must establish that the defendant both (1) took conscious action to seek to make the criminal action succeed, and (2) rendered such aid with the specific intent to commit the crime or with knowledge that the principal had such a specific intent.

Here, the prosecution failed to establish either element required to prove that Cornell Fuller was an aider and abettor. There was insufficient evidence for a rational fact-finder to conclude beyond a reasonable doubt that Cornell Fuller rendered any aid or assistance to the crime. The State's speculation that Fuller would have assisted, if necessary, and that he intented to assist, if necessary, is no substitute for proof of guilt beyond a reasonable doubt.

3. In Jackson v. Virginia, supra, this Court noted that if a state appellate court invoked the proper standard in considering a claim of insufficient evidence, its determination would not "totally bar a properly presented claim" under § 2254 but would be "entitled to great weight." Id. at 575, n.15. Petitioner, relying on language in the majority opinion of the Michigan Supreme Court, argues that "a standard of review even more strict than is required by the Constitution" was applied by the state court. (Pet. Cert. at 12) Review of the Michigan law governing the standard of review on sufficiency of the evidence questions, however, as well as review of the state courts' decisions in this case, including that of the Michigan Supreme Court, establishes that none of the Michigan courts, in considering the sufficiency of the evidence to support Cornell Fuller's conviction, applied a standard

as strict as that held to be required by this Court in Jackson v. Virginia.

A review of Michigan case law both before and after the Fuller decisions establishes that the standard of review applied to claims of insufficiency of the evidence was not as strict as that required by Jackson v. Virginia. A Michigan appellate court tested the merits of the denial of a motion for a directed verdict by taking the evidence presented by the prosecution in the light most favorable to the prosecution and determining if there was any evidence upon which the trier of fact could predicate a finding of guilt. See, e.g., People v. Garcia, 398 Mich. 250, 256 (1976); People v. Johnson, 397 Mich. 686, 687 (1976); People v. Vail, 393 Mich. 460 (1975); People v. Abernathy, 253 Mich. 583, 587 (1931).

In People v. Hampton, 407 Mich. 354 (1979), the Michigan Supreme Court, applying this Court's decision in Jackson v. Virginia, expressly abandoned the "any evidence" rule. Hampton, however, was decided long after the state courts had considered the conviction of Cornell Fuller, presumably under the previous "any evidence" standard.

Even applying the old standard, the judge presiding at Cornell Fuller's trial, in considering the motion for a directed verdict, stated, "The question in this case is a close one." The trial court stated: "There was very meager evidence to call him a look-out in this particular case; however, the Court is of the impression that we do have a borderline prima facie case in this instance--a borderline prima facie case--and, accordingly, the court will reserve its ruling on the motion for a directed verdict." (C/A App. 121a)

Likewise, the Michigan Court of Appeals did not apply a standard comparable to that required by Jackson v. Virginia: "Our inquiry is, was evidence produced which, if

believed, could certainly lead to a reasonable inference that defendant was a party to the offense." People v. Fuller, 44 Mich. App. 297, 299.

In the Michigan Supreme Court, the dissenting justices argued there was insufficient evidence to establish the guilt of Cornell Fuller beyond a reasonable doubt:

> There are simply too many inferences that would have to be drawn, one piled upon another, to justify conviction of this defendant. The prosecution has not negated "every reasonable theory consistent with the defendant's innocence of the crime charged". The due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". In re Winship, 397 US 358, 364; 90 S.Ct 1068; 24 L.Ed.2d 368 (1970).
>
> People v. Fuller, 395 Mich. 451, 459-460 (1975) (T.G. Kavanaugh, C.J., dissenting).

The majority disagreed:

> It is for the trier for fact to determine if the prosecution has "negate[d] every reasonably theory consistent with the defendant's innocence of the crime charged." It was so determined in this case.
>
> People v. Fuller, 395 Mich. 455. (Emphasis supplied.)

The majority opinion of the Michigan Supreme Court did not apply "a standard of review even more strict than is required by the Constitution," as contended by petitioner. Rather, the majority concluded that the question of Cornell Fuller's guilt, having been determined by the jury, would not be considered by the court.

It was not until Cornell Fuller's petition for a writ of habeas corpus was filed that any court viewed the evidence at his trial to determine if it was sufficient to permit any rational trier of fact to find proof beyond a reasonable doubt. The District Court and, later, the Court

of Appeals, determined the evidence fell short of the standard required by the Constitution.

4. Petitioner emphasizes the fact Cornell Fuller's trial attorney denied his client was at the scene of the fire. In his opening statement he told the jury the "only question" was "whether or not the defendant, in fact, was the party standing at the scene." (C/A App. 34a) Pet. Cert. at 4-5, 11-12.

The statement of the trial counsel may explain how a jury could return a guilty verdict in this case. It does not excuse the prosecution's failure to produce evidence of guilt beyond a reasonable doubt. In Michigan, once a plea of not guilty is entered, unless the defendant--not his counsel--tenders an understanding waiver, the defendant has an absolute right to a jury determination of all of the elements of the offense charged. See People v. Reed, 393 Mich. 342 (1975); People v. Allenworth, 401 Mich. 67 (1977).

Petitioner's argument, although not explicitly stated, appears to be that, given Cornell Fuller's defense counsel's opening statement, relief should be denied if there was evidence from which a rational jury could have found, beyond a reasonable doubt, that Cornell Fuller was at the scene. This argument lacks support from any of the courts which have considered this case. No court, state or federal, has relied on the opening statement of trial counsel and none has suggested the prosecution was relieved of its burden of establishing all elements of the offense.

5. The Constitutional stature of the reasonable doubt standard was made explicit for the first time by this Court's holding "that the Due Process Clause protects the accused

against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 264 (1970).

Jackson v. Virginia, 443 U.S. 307 (1979), held that a state court conviction could not withstand constitutional scrutiny if it was not supported by proof beyond a reasonable doubt. The Court stated (Id. at 324):

> We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254--if the settled procedural prerequisites for such a claim have otherwise been satisfied-the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

Applying the Jackson standard to the record evidence adduced at the trial of Cornell Fuller, the District Court found that the conviction could not be sustained. The court recognized and applied the requirement that conflicts in the evidence be resolved in favor of the State. The court found, however, that, in the light most favorable to the prosecution, the evidence of guilt was too meager to support Cornell Fuller's conviction:

> The evidence outlined above cannot constitutionally sustain a finding that the petitioner had either of the elements of intent required by Michigan law. The evidence establishes only that the petitioner was with Zerious Meadows and other boys before and after the fires were started, and that the petitioner was looking around while Meadows started them. This suggests as Jefferey Coleman surmised, that the petitioner may have been acting as a lookout for Meadows. It is reasonable speculation. But could a rational jury find it to be proof beyond a reasonable doubt? No evidence was presented that the petitioner intended to burn the Turner home. The evidence that he knew what Zerious Meadows planned to do is simply too meager to support conviction. The state has failed to meed the constitutional burden imposed by In re Winship, and no rational jury could conclude that it succeeded. (Pet. App. 26a)

The Court of Appeals agreed that the State's evidence in this case was simply too meager to support a conviction:

> The only direct evidence supporting the State's contention that Fuller "stood guard and acted as a lookout" for Zerious Meadows was Jefferey Coleman's testimony that over a period of several minutes Fuller turned his head from side to side "more than twice". We agree with the district court that this is insufficient to establish beyond a reasonable doubt that Fuller took conscious action to aid Meadows' commission of arson. (Pet. App. 11a)

Both lower courts, having carefully considered the record evidence as required by Jackson v. Virginia, correctly concluded that the conviction of Cornell Fuller could not withstand constitutional scrutiny.

## CONCLUSION

This case presents no important question of federal law requiring settlement by this Court. The decision below was required by the record in this case. It was reached using correct legal principles, is not in conflict with any other decision, and is dependent solely upon its own unique facts.

## RELIEF REQUESTED

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FEDERAL DEFENDER OFFICE

KENNETH R. SASSE, P24365
Attorney for Respondent
600 Woodward Avenue
Detroit, Michigan 48226

Dated: December 7, 1981

NO. 81-855

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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CHARLES ANDERSON, Warden,

Petitioner

-vs-

CORNELL FULLER,

Respondent.

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CERTIFICATE OF SERVICE

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KENNETH R. SASSE, in compliance with Supreme Court Rule 28.4(a) and 28.5(b) does hereby certify that he is a member of the Bar of the Supreme Court and that on the 7th day of December, 1981, did deposit in the United States mail with postage fully prepaid, one (1) copy of the Brief for Respondent In Opposition and attached Motion for Leave to Proceed in Forma Pauperis, addressed to Thomas L. Casey, Assistant Attorney General 525 West Ottawa Street, 762 Law Building, Lansing, Michigan 48913.

Kenneth R. Sasse

KENNETH R. SASSE

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NO. 81-855

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SUPREME COURT OF THE UNITED STATES

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Respondent.

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CERTIFICATE OF FILING

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KENNETH R. SASSE, in compliance with Supreme Court Rule 28.2, does hereby certify that he is a member of the Bar of the Supreme Court, and that on the 7th day of December, the "Brief for the Respondent in Opposition" and attached "Motion for Leave to Proceed in Forma Pauperis," in the above-captioned case, addressed to Clerk, Supreme Court of the United States, Washington, D.C. 20543, with first-class postage prepaid, was deposited in a United States mailbox in Detroit, Michigan.

Kenneth R. Sasse
KENNETH R. SASSE

Subscribed and sworn to before me
this 7th day of December, 1981

Peggy Marie Davis
PEGGY MARIE DAVIS, Notary Public
Wayne County, Michigan
My Commission Expires: June 18, 1985